Supreme Court, U. S.
FILED
MAR 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-1370

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, *ET AL.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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March 27, 1978

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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No. 77-

FORD MOTOR COMPANY,

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v.

UNITED STATES OF AMERICA, *ET AL.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Ford Motor Company, respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on December 29, 1977.[1]

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[1]Respondents to this Petition are United States of America, Interstate Commerce Commission, and Middle Atlantic Conference, Rocky Mountain Motor Traffic Bureau, and Southern Motor Carriers Rate Conference, Intervenors in support of Respondents below, and National Industrial Traffic League and Jones Transfer Company, Petitioners below. National Industrial Traffic League and Jones Transfer Company have each filed petitions for writs of certiorari to review the Third Circuit decisions (Nos. 77-1189 and 77-1162, respectively).

ORDERS AND OPINIONS BELOW

The judgment opinion of the Court of Appeals is not yet reported and appears in the Appendix hereto (3a).[2] The action in the Court of Appeals sought review of decisions and orders of the Interstate Commerce Commission (ICC) in Ex Parte No. MC-88, *Detention of Motor Vehicles — Nationwide.* The initial report and order of the Interstate Commerce Commission was decided on May 12, 1976, and is reported at 124 M.C.C. 680 (15a). The second report and order of the Commission, on reconsideration, was decided on June 3, 1977, and is reported at 126 M.C.C. 803 (135a). The third decision and order of the Commission, on further reconsideration, was issued on September 14, 1977 and is unpublished (165a). All of the decisions appear in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on December 29, 1977 and this petition for certiorari was filed within ninety days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does this Court's decision in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972) impose so narrow a scope of review that a Court of Appeals must mechanically approve an Interstate Commerce Commission rule without a careful scrutiny of the record to determine that the rule is factually supported and without a careful

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[2]References to the consolidated appendix which has been submitted by petitioners seeking review of the Court of Appeals' decision are given as "_____a."

review of the agency decision to determine that it has a rational basis?

2. Does the Interstate Commerce Commission have the administrative discretion to curtail long standing carrier obligations to perform delivery services as part of line-haul service in the absence of any rational explanation of its action or of its departure from prior cases, and in derogation of the principle recently affirmed by this Court in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973), requiring the agency to determine whether a carrier's rate should be reduced to reflect a proposed reduction in carrier service?

STATUTORY PROVISIONS

United States Code, Title 5:

§706. Scope of Review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Code of Federation Regulations, Title 49:

§1307.35(e)(2) (Proposed)

Section 2, Definitions.

(f) 'Spotting' means the placing of a trailer at a specific site designated by consignor, consignee, or other party designated by them, detaching the trailer, and leaving the trailer in full possession of the consignor, consignee, or other designated party unattended by carrier's employee and unaccompanied by power unit. Carrier will not move the trailer until such time as it has received notification, pursuant to section 3, that the trailer is ready for pickup at any site on premises. Consignor, consignee, or other designated party may shift the spotted trailer with its own power units at its own expense and risk for the purpose of loading or unloading. Empty trailers placed at the

premises of consignor without specific request are not spotted until the carrier receives a consignor's request and places a trailer for spotting. Movement of the trailer from consignor's premises to the specific site for spotting shall be the obligation of the carrier, and free time shall accrue as provided in section 3.

STATEMENT OF THE CASE

1. Summary of the Case

This case involves a vital relationship between truckers and their shipper customers. Current practices are eminently satisfactory to both, and result in lower transportation costs — and transportation costs are ultimately borne by the public. Nevertheless, the Interstate Commerce Commission (ICC) has undertaken (in a twice-reconsidered decision) to interfere with these efficient and satisfactory practices, for vaguely-defined purposes that amount to "regulation" for regulation's sake. Ford Motor Company, as a major shipper and receiver by truck, is directly affected by uneconomic practices proposed to be mandated by the ICC.

Under their tariffs, truckers are obliged to deliver goods and pick up loaded trailers at shippers' cargo receiving and loading docks. Many truckers do not — and cannot — maintain their own terminals near all shippers' plants. Therefore, in order to permit deliveries throughout the 24 hours of the day and to permit empty trailers to be conveniently ready for outbound loads, plants permit truckers to drop off loaded trailers and leave empty trailers in holding yards. By using these yards, truckers need not bring trailers from terminals many miles away or invest in multiple unnecessary terminals.

The present system works splendidly, but the ICC, in the service of a vaguely-defined ideal of "uniformity" has

issued rules to abrogate this shipper-carrier cooperation. The result is unsupported by fact or logic, unsatisfactory to carriers and shippers, will ultimately be more costly to the public, and withdraws services now included in tariff rates without adjusting the rates — in contravention of the plain language of this Court's decisions.

2. The Agency's Detention Rules

Following notice-and-comment rulemaking procedures, the ICC has issued regulations in ICC Docket Ex Parte MC-88, *Detention of Motor Vehicles — Nationwide,* to provide "uniform" nationwide rules governing charges for detention of motor vehicles by shippers and receivers (consignees) incident to the loading and unloading of freight shipments. Detention charges are theoretically imposed to encourage shippers and consignees to release carrier equipment promptly.[3] As an adjunct of the rules governing detention charges, the ICC has included a provision that declares that a motor carrier trailer is "spotted" (or placed for delivery) whenever a truck is detached from the power unit on a consignee's property. This means that motor carriers no longer have to meet their tariff obligation to place trailers at the consignee's unloading dock to effect delivery. This obligation is now paid for as part of the line-haul truck rates.

The long-standing industry practice is to allow carriers to use a "holding area" established at the consignee's premises to drop off trailers, thereby eliminating the need to tie up the carrier's expensive over-the-road power unit while awaiting the time for placement of the trailer at the unloading dock.[4] The ICC's rule changing delivery

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[3]Petitioner Ford Motor Company does not challenge ICC determinations respecting the level of detention charges.

[4]Thus where shipments arrive at night when a plant is closed, or when carriers deliver trailers to a plant at the same time, a carrier can leave the trailer in the holding area at its convenience and free the

requirements and abrogating carrier delivery obligations was *not* accompanied by any corresponding action to determine if the decrease in carrier responsibilities should result in an adjustment of the rates charged by the carriers for their line-haul service.

Detention charges are imposed under the motor carrier tariffs. The "spotting" provision just promulgated by the ICC does not, in fact, change the applicability of detention charges.[5] (J.A. 31). Such charges have always been and remain applicable to any detention of a motor carrier's trailer in the holding area. As soon as the carrier informs the consignee that the shipment has arrived, the tariff stipulated "free time" period allotted for unloading begins to run and then detention charges (on an hourly or daily basis) are charged if unloading is not completed and the trailer released within the unloading period. *Free storage in a trailer is not provided* to a consignee as a result of the use of a consignee-supplied holding yard.

Although the fact is that carrier detention charges *are* applicable to trailers in consignee holding yards, the ICC has continued to justify its mischief-making "spotting" provision by explaining that without this rule, shippers and consignees could avoid detention charges by means of holding yards. The ICC has persisted in this basic misconception despite repeated efforts of participants in the ICC proceeding to set the record straight. Thus, the most recent of the three agency decisions and orders in the docket dismisses protestants' arguments by saying:

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driver and the over-the-road power unit from needless waiting. These holding areas are typically fenced parking lots on the consignee's property. They are operated by the carriers, or their agent, who takes possession of the trailer and later moves the trailer from the lot to the unloading area.

[5]References to the administrative record in the Joint Appendix before the Court of Appeals below are given as "J.A. ".

> "This argument ignores the fact that the convenient holding yard arrangement advocated by petitioners allows large shippers the advantage of *unlimited spotting with little or no likelihood of incurring any detention charges.*" (168a). (emphasis added)
>
> * * *
>
> ". . . Loaded and empty trailers requested by consignors should not have to wait hours and days *in limbo before free time can toll.*" (169a). (emphasis added)

Not only are the spotting provisions based on a wholly erroneous factual premise, but they have no other evidentiary or legal support on the record. What is more, these restrictions are totally illogical, for they run directly counter to the agency's purported goals in establishing "uniform" detention rules.

3. Holding Yards Serve Important Carrier and Shipper Needs and Reduce Costs to the Public.

The agency's declared objective in instituting Ex Parte No. MC-88 was to establish uniformity in motor carrier detention rules and charges. A secondary objective was to determine whether carriers should be required to publish tariff provisions permitting consignees to establish prearranged delivery schedules and avoid detention charges if the carrier's vehicles arrived ahead of time. Since the ICC decided that prearranged delivery scheduling should be *mandatory,* any consignee, large or small, can require a carrier to place its trailer at the plant unloading facilities at a particular time. The spotting provision deals with the use of holding areas as an alternative to prearranged delivery schedules — an alternative which has in the past given carriers and consignees much needed flexibility.

Use of holding yards permits a carrier to make the most efficient use of its drivers and over-the-road power units by eliminating needless and costly waiting time. A carrier can deliver trailers to a plant 24 hours a day, whether or not the plant is open. A single power unit operated by holding yard personnel frees dozens of drivers and over-the-road tractors, each of which would otherwise queue to deliver the trailers to the loading dock on a prearranged schedule basis. Without the use of holding yards, pressure on carrier terminal facilities, scheduling problems, and concomitant delays would be severe where deliveries must be made to plants receiving large numbers of trailers each day.[6] Moreover, holding yards expand service opportunities for carriers and shippers by permitting those carriers who do not have holding facilities near a particular consignee's plant to compete for the traffic.

The spotting provision promulgated by the Commission relieves the carrier of the responsibility for switching the trailer between the holding yard and the unloading area. It requires the shipper or consignee to pay the costs of the transfer in addition to paying the usual freight charges. Consequently, if permitted to go into effect, this rule would largely eliminate the holding yard alternative. Shippers can be expected to insist on "live" pre-scheduled deliveries which do not involve additional costs for placement at unloading areas. So, instead of furthering the purported agency goal of lessening detention of motor carrier equipment, the spotting provisions would result in increased detention of equipment.

4. The Agency's Decisions

Over the course of the various decisions and orders issued, the Commission has never reconciled the spotting provisions with the proceeding's presumptive overall ob-

[6]Some plants receive as many as 150 loaded trailers in a day. As many as 50 different motor carriers may serve a plant.

jective of eliminating equipment detention. Indeed it could not do so. The only study of record demonstrated conclusively that the use of holding yards eliminated chargeable detention (detention past free time) of power vehicles, substantially reduced the use of power vehicles in the delivery process and reduced chargeable detention of trailers to a negligible figure (1.5 percent). (J.A. 36-37, 628, 630). Instead of a rational explanation of its proposals, the ICC has offered a series of shifting and contradictory reasons for the spotting rule, grounded in the incorrect premise that detention charges are inapplicable to equipment in holding yards when in fact charges *are* applicable during this period.

A good example of the agency's inconsistent and illogical approach is its completely different treatment of holding yards at origin (loading) points and at destination (delivery) points. During the course of the proceeding, the ICC revised its spotting rules to permit continued operation of holding areas on shipper's or consignor's property at origin points, citing the very same factors which protestants showed support continued use of destination holding yards, *i.e.*, operating efficiencies, reduced power and driver waiting time and duplicate mileage, better service to industries located far from established terminals, etc. (140a-142a, 167a).[7]

The ICC never justified its curtailment of carrier delivery obligations. Initially, the agency took the position that carrier operated holding yards were a departure from traditional industry practices. (73a). But in its first decision on reconsideration, the agency changed to argue only that the practice was not universal (based upon a reference to

[7]The agency decisions are also internally inconsistent. Thus, each of the agency's reports contains statements that trailers in holding yards are not spotted (because they remain in the carrier's possession), as well as statements that such trailers must be deemed spotted — leading to real confusion about which detention charges apply.

one plant of a consignee, although there were carrier operated holding yards at other major plants of the consignee). (140a). Its only comment on the long line of cases holding that placement for delivery at consignee unloading areas was a carrier obligation was that these cases were inapposite. (73a).

Throughout the Ex Parte No. MC-88 proceedings, there have been agency intimations of the possibilities of discrimination between large and small shippers, but the record is devoid of any basis for this purported justification. Initially the Commission suggested that holding yards permitted large shippers greater control over delivery timing than small shippers. (74a). Yet in this very decision, the ICC eliminated any such possible advantage by requiring prearranged deliveries for all shippers. (43a-47a). Thus, small shippers could precisely control delivery times.[8] Later, the agency argued that discrimination would exist because large shippers could use holding yards to avoid detention charges. (168a). This is simply not so, since detention charges *are* applicable to equipment in holding yards. There is simply no evidence of record that:

—the use of holding yards contributes to detention; *or* that

—the use of holding yards causes a small shipper to get any less efficient service for his operation than a large shipper gets; *or* that

—the use of holding yards causes small shippers to bear the rate burden of big shippers.

To the contrary, the record shows that permitting the use of holding yards as an alternative to prearranged deliveries decreased detention of equipment. Consignees remain free

[8]There is no evidence to show that use of holding yards is confined to large shippers. On the contrary, both small and large shippers use such facilities (J.A. 555-558).

to schedule live deliveries on a prearranged basis where that system gives better operating control.

While the Commission made no independent study of the comparative costs of carrier deliveries with or without holding yards and while the only evidence of record showed that *carrier costs were less* when holding yards were used (J.A. 887-890), nevertheless, the agency action requires a consignee to pay more for a service which would cost the carriers less. It would be hard to find agency action which so completely lacks any rational basis.

5. The Court of Appeals Decision

Accordingly, petitioner, joined by other protesting shippers and motor carriers, sought review of the ICC's adoption of section 2(f) of the detention rules in the Court of Appeals for the Third Circuit. Although the Court denied the requested relief, *per curiam*, it is evident from the Third Circuit's opinion that it refrained from acting because it believed itself severely constrained by this Court's decision in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972).

The Third Circuit was plainly concerned with the poor quality of the ICC decisions and orders. It characterized the ICC's discussion of the issues raised by petitioners to be "at best, laconic", (10a) and criticized the fact that the ICC's conclusions seemed unrelated to the record. The court never attempted to show how the agency conclusions were rationally based and grounded in the record. Instead, after stating that the Supreme Court in *Allegheny-Ludlum* "has formulated a scope and standard that severely limits the extent of judicial review" (9a), the court explained that its conclusion might well have been different "[w]ere we able to utilize a more expansive notion of what is 'arbitrary, capricious, and an abuse of discretion' ". (10a).

REASONS FOR GRANTING THE WRIT

This case raises important questions about the exercise of administrative discretion in rulemaking proceedings and the role of the courts in reviewing an agency's action under section 706 of the Administrative Procedure Act, 5 U.S.C. §706(2)(a). The Third Circuit's decision is in conflict with decisions of courts in other circuits by adopting a "hands-off" approach which permits an agency to exercise its rulemaking function unbounded by any meaningful judicial oversight. The agency rulemaking in this case presents a striking example of the need for a court to perform its reviewing function. The ICC's action lacks any factual or rational basis, or explanation of its departure from prior cases, and runs counter to the principle recently reaffirmed by this Court in *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800 (1973), requiring the agency to consider whether the carrier's rate should be reduced to reflect a curtailment in carrier service.

1. THE THIRD CIRCUIT APPLIED AN IMPROPERLY NARROW STANDARD OF REVIEW

Petitioner submits that the Third Circuit's decision incorrectly interpreted *Allegheny-Ludlum* so as to preclude any meaningful review. Although the Third Circuit correctly recited the formula for judicial review set out in *Allegheny-Ludlum*, it did not take the steps needed to apply this formula. This is not the standard set in *Allegheny-Ludlum*, nor is it the teaching of other decisions of this Court. These cases require that a reviewing court look closely to see (1) whether the agency has engaged in a rational decision-making process, (2) whether it has adequately explained its decision, and finally, (3) whether the action "makes sense" in terms of the record, the applicable legal criteria and the reasons formally given. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S.

402, 415-416 (1971); *Camp v. Pitts*, 411 U.S. 138 (1973). *See also, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-286 (1974); *Federal Power Commission v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976).

In *Allegheny-Ludlum*, this Court reviewed agency action taken pursuant to a specific Congressional directive that the Interstate Commerce Commission establish regulations and policies to deal with recurring shortages of freight cars in the nationwide railroad system. Despite the unusual circumstances of the legislative determination,[9] this Court's decision analyzed the record to make sure that there was an adequate factual underpinning (406 U.S. 745-746). It determined that the agency had articulated the reasons for its decision (406 U.S. 751) and established that there was a rational connection between the evidence in the record and the action taken (406 U.S. 751-752). Although the scope of review mandated by *Allegheny-Ludlum* is limited, neither its example nor its language requires a reviewing court to affirm agency action in all cases whatsoever, regardless of the inadequacies of the agency's decisional process.

The narrow view of a reviewing court's role taken by the court below is in sharp contrast to the view of courts in other circuits. Most courts have read this court's decisions in *Allegheny-Ludlum* and other cases as imposing a duty to review the record carefully and test the agency's conclusions to determine whether the agency has exercised a reasoned discretion. *Burlington Northern, Inc. v. United States*, 549 F.2d 83 (8th Cir. 1977); *Chemical Leaman Tank Lines, Inc. v. United States*, 368 F.Supp. 925 (D. Del. 1973); *Ann Arbor Railroad Co. v. United States*, 358 F.Supp. 933 (E.D. Pa. 1973). When this standard was not met, these courts have not hesitated to remand proceedings

[9]This Congressional factfinding was described in United States v. Florida East Coast Railway Co., 410 U.S. 224, 230-31 (1973).

to the agency for correction. *National Association of Food Chains, Inc. v. Interstate Commerce Commission,* 535 F.2d 1308 (D.C. Cir. 1976); *B.F. Goodrich Co. v. Department of Transportation,* 541 F.2d 1178 (6th Cir. 1976), *cert. den.* 430 U.S. 930 (1977); *Alabama Association of Insurance Agents v. Board of Governors,* 533 F.2d 224 (5th Cir. 1976); *South Terminal Corp. v. Environmental Protection Agency,* 504 F.2d 646 (1st Cir. 1974); *Chemical Leaman Tank Lines, Inc. v. United States, supra.*

A very recent case of the Court of Appeals for the District of Columbia Circuit, *Almay, Inc. v. Califano,* No. 76-1718, (D.C. Cir. Dec. 21, 1977), points out the particular need for judicial review in informal rulemaking proceedings precisely because of the absence of a formal evidentiary record and the concomitant reliance on agency discretion. The opinion expressly rejected the notion that there was a " 'super-presumption of correctness' standard" (*Id,* Slip Op. at 13). *Almay* echoed the warning of the Circuit's earlier opinion in *Ethyl Corp. v. Environmental Protection Agency,* 541 F.2d 1 (D.C. Cir.), *cert. denied* 426 U.S. 941 (1976), of the consequences of a reviewing court adopting as restrictive a role as the court below did:

> "This is not to say, however, that we must rubber-stamp the agency decision as correct. To do so would render the appellate process a superfluous (although time-consuming) ritual". (Slip Op. at 13).

Legal commentators have also stressed the usefulness of a vigilant, albeit limited, judicial review of informal rulemaking to curb agency abuses, pointing out that the agencies are not well-equipped to correct errors through their own proceedings,[10] and that this judicial task is "straight-

[10]Pedersen, Formal Records and Informal Rulemaking, 85 YALE L.J. 38, 59-60 (1975).

forward detective work" well suited to "generalist judges".[11]

At the same time, there has been a recognition of the usefulness of further leadership from this Court in defining the reviewing court's task, since the agencies are increasingly using the informal rulemaking process.[12] The decision of the court below, virtually abdicating the reviewing function because of imagined constraints, illustrates the need for this Court's guidance.

2. THE INTERSTATE COMMERCE COMMISSION ACTED ARBITRARILY AND CAPRICIOUSLY BY CURTAILING LONG-STANDING CARRIER OBLIGATIONS TO PERFORM DELIVERY WITHOUT ANY RATIONAL BASIS, OR EXAMINATION OF ITS DEPARTURE FROM PRIOR CASES, OR CONSIDERATION OF THE APPROPRIATENESS OF A RATE ADJUSTMENT.

Petitioner submits further that the ICC's adoption of the spotting provision in Section 2(f) of the detention rules was an abuse of administrative discretion. This agency action could serve as a classic example of arbitrary and capricious conduct. It was based on a wholly incorrect factual premise — that the use of holding yards permitted consignees to avoid detention charges — when detention charges are applicable to trailers in holding yards. The various reports and orders in the proceeding are riddled with in-

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[11]Wright, The Courts and the Rulemaking Process; The Limits of Judicial Review, 59 CORNELL L.Q. 375, 393 (1974).

[12]K.C. Davis, Administrative Law of the Seventies, §29.01-2 (1976); Verkuil, Judicial Review of Informal Rulemaking, 60 VIRGINIA L. REV. 185, 210 (1974). The Court of Appeals of the District of Columbia recently observed: "[T]here is no concensus among the circuits as to the appropriate standard of review, . . ." National Association of Food Chains, Inc. v. ICC, 535 F.2d at 1313.

consistencies.[13] The spotting provisions run counter to the declared agency objective of reducing detention and inefficient use of carrier equipment.

There was no evidence that the use of holding yards contributed to detention, or that the consequence of permitting the use of holding yards as an alternative to prearranged live deliveries caused small consignees to get any less efficient service than large consignees or caused small consignees to bear the rate burden of large consignees or of any other preferential treatment. The only evidence of record established that holding yards *reduced* equipment detention and carrier costs. The Commission's action in requiring prearranged deliveries at any consignee's request offset any possible advantage to large plants.

The *Almay* court summarized the requirement that agency rulemaking action must rest on some factual basis in the record:

> "The fact that an 'arbitrary and capricious' standard applies to informal rulemaking, rather than a 'substantial evidence' requirement, cannot mean that *nothing* of an evidentiary nature is needed in the administrative record to support an agency decision". (Slip Op. at 15).

Moreover, this Court has repeatedly explained that the agency must articulate the basis of its action and show that there is a rational connection between the facts found and the choice made. ***Burlington Truck Lines, Inc. v. United***

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[13]Good examples are the conflicting statements regarding spotting. The ICC formulation of the spotting rule, which states that spotting occurs when a trailer is left in the full possession of a consignee unattended by a carrier's employee, is inconsistent with the agency's interpretation of the rule that any detachment of a trailer on the consignee's premises is a spotting. (73a, 139a, 168a). Moreover, there are conflicting statements raising doubts about whether detention with or without power charges is applicable. (73a, 139a, 166a).

States, 371 U.S. 156, 168 (1962). *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402 (1971). It is not sufficient that there *might* have been legally adequate reasons for the action; the agency itself must have made such findings. *SEC v. Chenery Corp.,* 318 U.S. 80, 94 (1943).

The ICC decision in Ex Parte No. MC-88 fails to state any evidentiary basis for the spotting provision or to demonstrate any rational connection between the provision and the purposes of the proceeding. The ICC's action here is reminiscent of another recent ICC rulemaking which also attempted to abrogate motor carrier delivery obligations. *See National Association of Food Chains, Inc. v. ICC,* 535 F.2d 1308 (D.C. Cir. 1976) The reviewing court vacated the agency's action, explaining that the Commission's order "did no more than recite the problems of abuses. . ." but "did not demonstrate that its conclusion . . . was supportable on the record before it." *Id.* at 1318.

Another serious deficiency in the ICC's decision is the failure to rationally explain its departure from prior cases holding that deliveries from temporary holding yards are a part of the carrier's obligation in providing line-haul service. *Carrier Switching at Industrial Plants in The East,* 294 ICC 159 (1955) was a major ICC proceeding to define and establish carrier delivery obligations. The agency expressly stated that the temporary holding of cars on tracks of the carrier or the industry did not terminate the obligation of the carrier to place the cars at the consignee's unloading platform. In a related ICC decision, *American Smelting & Refining Co. Terminal Services,* 294 ICC 745 (1955), the agency examined holding yard practices for railroad cars similar to the motor carrier holding yard practices and ruled that subsequent placement at unloading platforms was the carrier's responsibility. These and other similar ICC rulings accord with well-established court precedents stating that delivery is the common law duty of a carrier. *Wabash Railroad Co. v. Pearce,* 192 U.S. 179

(1904); *Interstate Commerce Commission v. Atchison, Topeka & Santa Fe Railway Co.*, 234 U.S. 294 (1914); *Loveless Manufacturing Co. v. Roadway Express, Inc.*, 104 F.Supp. 809, 812 (N.D. Okla. 1952).

Not long ago, when the ICC took action which would have required shippers to pay an additional charge for service covered by the carrier's line-haul rate, this Court reminded the agency that its discretion was not unbounded and that it has a "duty to explain its departure from prior norms." *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973). Apparently this lesson was ignored, for in Ex Parte No. MC-88, the agency's only attempt to reconcile its action with prior precedents was to comment that cases involving railroad practices were "not analogous". (73a).

Another teaching of *Wichita Board of Trade* was disregarded by the ICC. Where an extra charge is to be imposed for a service previously covered by the line-haul rates, this Court has required the agency to determine whether the carrier should reduce its line-haul rate to reflect the reduction in service. *Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. at 816-818; *Secretary of Agriculture v. United States*, 347 U.S. 645, 652 (1954). The spotting provision would impose a separate charge for placement of trailers at unloading areas when the trailers had been temporarily placed in consignee holding yards, although the motor carrier line-haul rates presently include complete delivery. Yet the ICC did not even consider whether it was appropriate to order an adjustment in the carriers' rates (despite the showing that the use of holding yards decreases carrier costs).[14]

[14]The ICC recognized its obligation to review the reasonableness of a rate where a separate charge will be imposed for a service covered by that rate, but it chose to leave the issue for the "future" despite this Court's instruction in *Wichita Board of Trade*. (146a). The ICC has adhered to the rule reaffirmed in *Wichita Board of Trade* in a number

The ICC's adoption of the spotting provision fails to measure up to any proper application of standards of judicial review found in 5 U.S.C. §706. Accordingly, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

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of recent cases. Joint Petition for Declaratory Order — Private Sidetrack — General Motors Corp. and the Long Island R.R. Co., 351 ICC 691 (1976); Terminal Charges at Philadelphia, Baltimore and Hampton Roads Ports, 350 ICC 867, 876-77 (1975); Unloading Restrictions on Meats and Packinghouse Products, 346 ICC 775 (1974), on reconsideration, 349 ICC 189 (1975), vacated and remanded for further proceedings sub. nom. National Ass'n of Food Chains, Inc. v. ICC, 535 F.2d 1308 (1976), on remand order served June 29, 1977; Charges at New York Harbor, Penn Central Transportation Co., 344 ICC 21 (1972).

Supreme Court, U. S.
FILED
APR 28 1978
MICHAEL RODAK, JR., CLERK

IN THE

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No. 77-1370

FORD MOTOR COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT MIDDLE ATLANTIC CONFERENCE IN OPPOSITION

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BRIEF OF RESPONDENT MIDDLE ATLANTIC CONFERENCE IN OPPOSITION

QUESTIONS PRESENTED

1. Did the Court of Appeals erroneously apply the standard of review announced by this Court in *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1972)?

2. Did the Interstate Commerce Commission act arbitrarily and capriciously in prescribing motor carrier detention rules which require consignees to bear the expense of moving trailers from their holding yards to their unloading docks?

STATEMENT OF THE CASE

On June 22, 1973, the Interstate Commerce Commission instituted a rulemaking proceeding pursuant to the Administrative Procedure Act, 5 U.S.C. § 553, to consider adoption of proposed rules governing the detention of motor vehicle equipment by shippers and receivers of property. The proposed rules would supersede numerous existing rules which vary from region to region and carrier to carrier. As the Commission pointed out in its Notice of Proposed Rulemaking, the failure of motor carriers to provide uniform vehicle detention rules "has given rise to shipper and carrier complaints alleging unjust and unreasonable practices, unjust discrimination, preference and prejudice, as well as unlawful concessions and rebates." Accordingly, it stated that the purpose of the proceeding would be "to discourage undue delays of carriers' vehicles at origins, stopoff points, and destinations, at the same time to assure lawful, nondiscriminatory, nonpreferential, nonprejudicial, reasonable and adequate service, and reasonable vehicle detention rates and charges with respect to all classes, types and sizes of shippers and receivers of interstate freight shipments, nationwide" (A. 117a).

Following receipt of written statements from numerous parties representing shippers, carriers, government agencies, and others,[1] the Commission issued its report and order prescribing uniform nationwide detention rules on May 25, 1976 (A. 16a-134a). Following petitions for reconsideration, the Commission modified in part the report and order by a second report and order issued June 3, 1977 (A. 135a-164a). By order

[1] Some 69 parties filed initial responses to the Notice of Proposed Rulemaking (A. 18a).

dated August 31, 1977 (R. 1206-1208), the Commission denied various petitions for stay of its orders. A final order was issued September 15, 1977 (A. 165a-173a) in which the I.C.C. granted petitions for reconsideration and modification in part and denied petitions for reopening and oral argument. Hence, the rules under judicial review are the product of over four years of extensive analysis and review by the Commission. As it pointed out in its order dated August 31, 1977, the rules "were drafted to reach an equitable balance among the parties and thereby bring order to a troublesome and abused area."

Detention rules of motor common carriers, like demurrage rules of railroads, provide a fixed amount of so-called free time for the loading or unloading of vehicles and impose a detention charge for delays beyond the free time not attributable to the carriers. The Commission's order prescribes two separate rules, each complete and self-contained. The first governs the detention of straight trucks or tractor-trailer combinations, which have been ordered or used to transport shipments subject to truckload rates. Free time under this rule varies according to the weight of the shipment and ranges from two hours for shipments of less than 10,000 pounds to six hours for shipments of 36,000 pounds or more. The detention charges are $18 for the first hour or less and $9 for each additional 30 minutes or fraction thereof.

The second rule governs the detention of trailers only. Consignors and consignees may, at their option, require that trailers be dropped or "spotted" in holding yards on their premises for loading or unloading at their convenience. Free time is greater and detention charges are lower under this rule than under the first in recognition of the fact that the carriers' employees and power units are not detained. However, when the carrier's employee assists in loading, unloading, or checking the freight, the detention provisions governing vehicles with power units apply whether or not the power unit is actually detained. Free time commences once a trailer is spotted at a site designated by the consignor or consignee. Once a trailer is

spotted, the carrier will not move it until it is ready for pickup after loading or unloading. The consignor or consignee is responsible for moving the trailer from the holding yard to the loading or unloading dock. The practice of some carriers in providing this switching service is prohibited under the rule because the economies realized by not having drivers and power units detained "are lost when a carrier must either return a tractor to the yard to shuttle a trailer or pay an agent to do so" (A. 139a). However, it is often advantageous for carriers to drop empty trailers in trailer pools located on shippers' premises so that the trailers will be readily accessible for potential movements of freight. In such cases, the empty trailers, although usually used to transport freight for the shipper on whose premises the trailer rests, may also be used to transport freight for different shippers (A. 148a). The rule initially adopted was modified to provide that detention charges will not apply to trailers parked for a carrier's convenience. The rule provides that empty trailers placed at the premises of a consignor without specific request are not spotted until the carrier receives the consignor's request and places the trailer for spotting. The carrier has the obligation of moving the trailer from the place where it was dropped on the consignor's premises to the specific site designated for spotting. The Commission refused to modify the rule to permit this practice with respect to loaded trailers, however, since "a carrier derives no benefit from having its trailer stand idle awaiting unloading" (A. 141a). Spotted trailers are allowed 24 hours of free time for loading or unloading. The detention charges are as follows:

(1)	For each of the first and second 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted),	$25
(2)	For each of the third and fourth 24-hour periods or fraction thereof (Saturdays, Sundays, and holidays excepted),	35
(3)	For the fifth and each succeeding 24-hour period or fraction thereof (Saturdays, Sundays, and holidays included).	50

Appeals directed only to the second rule were filed in the United States Court of Appeals for the Third Circuit by petitioner and Jones Transfer Company, *et al.* (petitioners in No. 77-1162). Specifically, these petitioners challenged the Commission's conclusions "that the carriers' line-haul obligation ends when a loaded trailer is dropped in the consignee's holding yard" and "the cost of moving the trailer from the holding yard to the unloading dock is the responsibility of the consignee" (A. 168a). National Industrial Traffic League (petitioner in No. 77-1189) also challenged these conclusions and, in addition, it challenged the Commission's findings and conclusions relating to the level of detention charges for vehicles with power units and the burden of proving responsibility for delay of such vehicles.

By order filed September 2, 1977, the Court of Appeals stayed the effectiveness of the Commission's order pending completion of judicial review. On December 29, 1977, the Court affirmed the Commission's decision in a *per curiam* opinion issued in the three consolidated cases. The Court held that the Commission's findings and conclusions were rationally supported and that the evidence in the record was sufficient to sustain the exercise of the Commission's rulemaking authority (A. 10a-11a).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Petitioner advances two principal reasons why this Court should review the decision of the Third Circuit. First, it argues that the Court below misconstrued this Court's opinion in *United States v. Allegheny-Ludlum Steel Corp., supra.* Second, it says that the Commission's decision "arbitrarily and capriciously" requires shippers to bear the expense of moving trailers from their holding yards to their unloading docks. An examination of the petition shows that these contentions are without merit, and that petitioner has failed to set forth any other

special and important reasons why this Court, in the exercise of its sound judicial discretion, should grant certiorari (Rule 19(1)).

The Court of Appeals Properly Applied the Appropriate Standard of Review

Petitioner does not question that this Court's decision in *United States v. Allegheny-Ludlum Steel Corp., supra,* is controlling here. Rather, it says that the Court of Appeals failed to properly apply the standard of review announced in *Allegheny-Ludlum.* This is patently not so. In *Allegheny-Ludlum,* this Court set forth the standard of judicial review for actions of the Interstate Commerce Commission as follows:

> "We do not weigh the evidence introduced before the Commission, we do not inquire into the wisdom of the regulations that the Commission promulgates, and we inquire into the soundness of the reasoning by which the Commission reaches its conclusions only to ascertain that the latter are rationally supported." 406 U.S. at 749.

The Court of Appeals applied that standard here. It announced at the outset of its opinion that it would deny the relief sought in the petitions for review because it was "persuaded that there is a rational basis for the ICC conclusions" (A. 6a). In the course of its opinion, it quoted the standard of review set forth above. It concluded its opinion as follows:

> "... measuring the present petitions against the appropriate standard of judicial review, we conclude that the Commission's findings and conclusions 'are rationally supported.' And to the extent that evidence was required in the record to support the contested conclusions, we find it sufficient to sustain the exercise of the ICC's rulemaking authority" (A. 11a).

The Court's statement that it "might have been receptive to some of the arguments presented by the petitioners" were it "able to utilize a more expansive notion of what is arbitrary, capricious, and an abuse of discretion" does not indicate that it applied an improper standard of review. On the contrary, it shows that the Court was aware of the limited scope of judicial review in a case such as this. It is a long established maxim in the field of administrative law that the courts have no authority to substitute their judgment for that of an agency in the promulgation of regulations. *Addison* v. *Holly Hill Fruit Products,* 322 U.S. 607, 64 S.Ct. 1215 (1944).

The Commission's Decision Was Not Arbitrary and Capricious

Petitioner attacks the provision of the spotting rule which requires consignees to bear the expense of moving trailers from their holding yards to their unloading docks. It argues that motor carriers have a traditional duty to deliver to the unloading dock trailers which have first been dropped in a holding yard. On the contrary, the line-haul rates of motor carriers have traditionally included only one pickup and one delivery. *Paperboard Between New Jersey and New York,* 315 I.C.C. 187, 190 (1961).

Petitioner contends that the placing of trailers in holding yards at destination is for the mutual benefit of carriers and consignees. The Commission properly recognized, however, that "a carrier derives no benefit from having its trailer stand idle awaiting unloading." Carriers want their trailers unloaded as quickly as possible so that they can be made available for other shipments. Consignees are the sole beneficiaries of this practice. The use of holding yards at destination permits relatively inefficient consignees to avoid the detention charges for vehicles with power that would otherwise accrue because of their inability to accomplish deliveries within the allotted free times. As the Commission properly held, however, these consignees cannot have it both ways. If the carrier must leave

the trailer in a holding yard with itself or its agent available to move it, then the detention with power provisions should apply. If the consignee is to receive the benefit of the lower detention charges and greater free time provided by the detention without power rule, then it should be responsible for the movement of the trailer from the holding yard to the unloading area.

Petitioner asserts that the Commission's rule will "largely eliminate the holding yard alternative" (Pet., p. 9). The only effect of the rule will be to require consignees to bear the expense of switching trailers from holding yards to unloading areas. If, as petitioner argues, efficiency dictates the use of holding yards, the shifting of this expense from the carriers to the consignees will not have any effect on their continued use.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari should be denied.

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April, 1978

Supreme Court, U. S.
FILED
MAY 26 1978
MICHAEL RODAK, JR., CLERK

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TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY OF PETITIONER FORD MOTOR COMPANY

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REPLY OF PETITIONER FORD MOTOR COMPANY

REPLY ARGUMENT

The Government has opposed petitions for a writ of certiorari filed by several carriers, by petitioner Ford Motor Company, and by a major shippers' association.[1] These petitions seek review of a decision of the Court of Appeals for the Third Circuit which refused to set aside rules promulgated by the Interstate Commerce Commission concerning detention of motor vehicles. These rules upset existing carrier practices whereby the carriers avoid deten-

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[1]Oppositions have also been filed by several carrier organizations.

tion of their power equipment by using holding yards at consignees' plants for delivery of trailers.[2]

The Government's opposition rests upon a number of statements about the record in the agency proceeding that are simply not supported by the record itself. This is not surprising, since the agency's decision (a) is based upon shifting and contradictory reasons; (b) is grounded on an incorrect premise as to the applicability of detention charges; and (c) lacks record support for key determinations.

1. The Government's opposition carefully avoids stating that detention charges are applicable where trailers are placed in holding yards in lieu of delivery by placement at shipper unloading docks. (It never denies that this is so, and it painstakingly describes the application of detention charges in other circumstances. (Opp. p. 5.)) Yet the basic premise of the Commission's decision to change existing holding yard practices is its misconception that shippers and consignees could avoid detention charges by means of holding yards.[3] As Ford's petition demonstrates, the agency persisted in this erroneous factual premise through three rounds of decision-making. Apparently the Government concluded that the only way to defend the agency's position was to ignore the issue.

2. The Government tries to dispose of petitioners' claim that the ICC's spotting rules abrogate the carriers'

[2]Ford Motor Company has no quarrel with the Commission's desire to establish uniform detention rules or with the level of detention charges. But it does oppose the new spotting rules which relieve the carriers of responsibility for switching the trailer from the holding yard to the unloading area. The rule means that the shipper or consignee must pay new charges in addition to the usual rates, for less service, and would largely eliminate the use of holding yards.

[3]Detention charges have been applicable to trailers in holding yards and would continue to be applicable under the new rules. (Ford Pet., p. 7; Middle Atlantic Conference Opp. to Pet., pp. 3-4.)

established duty under line-haul tariff rates to provide delivery by stating that: "Many shippers already move trailers to their docks at their own expense." (Opp., p. 9, n. 8.) There is no citation to the record set out in the Government's brief, no doubt because this statement is not supported by the record of the agency proceeding. Again, the Government's difficulty arises because of the basic deficiencies in the agency determination. Originally the agency maintained that carrier-operated holding yards were a departure from traditional practices (73a). But in its first decision on reconsideration it changed to argue that the practice was not "universal" (139a-140a) based upon a reference to one plant of a consignee where the consignee shifted trailers, although there were carrier-operated holding yards at other major plants of the consignee. (Ford pet., pp. 10-11; J.A. 708-709.) Although some 18 shippers, 13 shippers' associations, 19 motor carriers and 12 carriers' associations and rate bureaus participated in the proceedings (81a-83a), neither the agency, nor the Government here have identified any other record support for this position.

Thus, contrary to the Government's unsubstantiated claim, *Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 816-18 (1973) is very much on point. Here, the ICC proposes to establish a spotting rule imposing a separate charge for a service previously covered by the line-haul rates.[4] But it did not consider,

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[4]The cases cited by the Government to show that the proposed spotting rules do not change existing carrier duties are inapposite. (Opp. pp. 9-10.) None of the cases involved the use of holding yards by carriers as a way of avoiding detention of over the road equipment and wasted driver time in accomplishing delivery. Montgomery Ward & Co. v. N. Pac. Term. Co., 128 F. Supp. 475, 491 (D. Ore. 1953) was a shipper's claim for damages for the railroads' failure to deliver and pick up at the plant during a strike. The court dwelt on the carriers' fundamental obligation to deliver to the consignee. General Elec. Co. v. Acme Fast Freight, Inc., 324 F. Supp. 1079, 1083 (D. Md.), *aff'd*, 440 F.2d 412 (4th

despite the mandate of *Wichita Board of Trade* (and the showing that the use of holding yards decreases carriers' costs) whether there should be an adjustment to the carriers' rates.

3. The Government argues that the imposition of additional charges on shippers and consignees under the spotting rules is justified because otherwise small shippers might bear the costs of big shippers. (Opp., pp. 10-11.) The agency never addressed this issue in its decisions and the argument has no support in the record. One of the major deficiencies of the agency decision is that although the agency refers to the possibility of service discrimination between large and small shippers, there is absolutely no evidence of record to support any claim of disadvantage, cost-wise or otherwise, to small shipppers resulting from the use of holding yards. The Commission made no independent study of the comparative costs of carrier deliveries with or without holding yards; the only evidence of record showed that carrier costs were lower where holding yards were used (J.A. 37-52). Not only is there no evidence that holding yards could result in higher costs to small shippers, but the record indicates that line-haul rates would be lower, not higher, if the holding yard alternative is available to the carriers. Moreover, the ICC eliminated any possible advantage to large shippers by mandating prearranged deliveries for all shippers.

Cir. 1971), raised liability question about shipments stolen from a trailer placed for unloading at an unloading bay at consignee's plant. Republic Carloading & Distrib. Co. v. Missouri Pac. R.R. Co., 302 F.2d 381, 386 (8th Cir. 1962) also involved liability for goods stolen in a freight depot. Paperboard Between N.J. & N.Y., N.Y., 315 I.C.C. 187 (1961), cited by Middle Atlantic Conference (Opp. p. 7), likewise did not involve holding yards. The ICC said that the carrier was entitled to additional compensation where up to five deliveries at different consignees were requested. The same point is made in Rules and Rates of O.K. Transfer Storage Co., 18 M.C.C. 699, 702 (1939), that motor carriers are not obliged to deliver to several consignees or to pick up from several consignors in connection with a single shipment.

The Government's efforts to defend the agency's action lay bare the basic weaknesses of that decision. The court below adopted a "hands-off" approach to its reviewing function because it believed itself severely constrained by this Court's decision in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742 (1942) — even though it expressed serious concerns about the agency's decision. Petitioners have asked that certiorari be granted because this case illustrates the need for clarification of the court's role in providing a limited, but meaningful, reviewing function. The court below did not properly apply the review standards set by this Court (even though it quoted at length from the *Allegheny-Ludlum* decision and recited that the agency action was "rationally supported"). The increase of agency use of the rulemaking process makes it even more critical that agency discretion be subject to effective judicial oversight.

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